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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS ESCOBEDO, Defendant and Appellant.	B150558 (Super. Ct. No. PA032246)

APPEAL from a judgment of the Superior Court of Los Angeles County, Warren G. Greene, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Myung J. Park, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jose Luis Escobedo appeals from a judgment of conviction entered after a jury found him guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), in the course of which he personally used a firearm (*id*., §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). The jury also found true the allegation that the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person or persons outside the vehicle with the intent to inflict death (*id*., § 190.2, subd. (a)(21)).[1] The court thereafter sentenced defendant to the term prescribed by law.

Defendant raises the following contentions: the trial court erred in denying his motion to suppress evidence, in that he established that his statements were obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In addition, there is insufficient evidence to support his first degree murder conviction and the special circumstance finding. Finally, the trial court erred prejudicially in refusing his requested special instruction and amplifications and in instructing the jury with CALJIC No. 2.90, the reasonable doubt instruction, and CALJIC No. 17.41.1, the anti-nullification instruction. We reject defendant's contentions and affirm the judgment.

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[1] The jury found the allegation that defendant personally discharged a firearm to be not true.

FACTS[2]

Sometime before 8:00 a.m. on August 31, 1998, Shawn Wilson (Wilson), a member of the Nurmi Street gang, killed himself. His wife, Dolores Avila (Avila), discovered his body.

Later that day, a group of people came to the home of defendant's 14-year-old sister, Damaris Lara (Lara), looking for her brother Javier Escobedo. One man said he was "Nurmi from Nurmi Street." He said they were going to kill Javier. One man had a gun; the others carried tools. When they returned home, Lara told her brothers, defendant and Javier Escobedo, about the incident.

Late in the day, Wilson's cousin, Caesar Pohl (Pohl), and his companion, Erika Moro (Moro), invited friends and family to gather at Pohl's home to grieve for the death of Wilson. Mark McDonnell (McDonnell), Wilson's brother-in-law, attended the gathering. By 9:30 p.m., people were standing outside and drinking beer.

At about this time, Avila[3] telephoned Moro. She told Moro that defendant was in the Maclay Boys gang. Avila warned Moro to "get [her] daughter out of there quick" because "family members were upset at what the guys have done." Avila also stated that "they were upset and they were out there to kill and that they don't play around."

At approximately the same time, Maria Villegas (Villegas) and Carlos Barrera, Sr. and Jr., noticed a van approaching the Pohl residence. Villegas and Carlos Barrera, Jr. saw two people in the van. As it drove up the driveway, McDonnell approached the driver's side to see who was in it. Once McDonnell informed the driver that he was from the San Fernando Street gang, the passenger pulled out a rifle, which he pointed directly at McDonnell. The driver told the passenger, "No, there's too many kids."

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[2] At this point, we set forth the facts as briefly as possible. More facts will appear in the discussion as they become necessary to resolution of the issues raised on appeal.

[3] Lara knows Avila as Javier Escobedo's girlfriend.

When he saw the rifle, McDonnell turned and ran for cover. Almost immediately thereafter, he heard what he believed to be rifle shots coming from the van, as did the Barreras and Villegas. As McDonnell ran for cover and the women and children ran into the house, a group of men ran toward the van, which was backing out of the driveway. Jerry Jordan (Jordan) approached the van on the driver's side. He grabbed the steering wheel as the van backed up. McDonnell heard a second set of gunshots from the van, these fired by both a rifle and a handgun. The Barreras also heard a second set of shots.

After the van left, the others discovered that Jordan had been shot. McDonnell called 911. Jordan died of multiple gunshot wounds.

The police recovered a .45 caliber casing from the driveway of the Pohl residence. The medical examiner recovered a .45 caliber bullet from Jordan's body.

On September 1, 1998, Los Angeles Fire Captain Larry Bickly found a van in flames near the site of the shooting. He turned over responsibility for impounding the van to the Los Angeles Police Department.

On October 6, 1998, based on information from Captain Bickly, Los Angeles Police Detective Lindy Gligorijevic and her partner recovered a burned-out van from a salvage yard. A police criminalist recovered two nine-millimeter casings from the van, one on the driver's dash and the other where the driver would step up into the van. The van had been stolen before Wilson's death.

In December 1998, Los Angeles Police Sergeant Mark Aragon showed Villegas a photographic display. She selected a photograph of Christian Rangel (Rangel), also known as Flaco, as the driver of the van on the evening of August 31. On December 21, 1998, Sergeant Aragon arrested Rangel.

Sergeant Aragon, an expert on gang-related homicides, arrested defendant at approximately midnight on December 21, 1998. After defendant waived his constitutional rights, Sergeant Aragon interviewed him at the Foothill Station. During the approximately three-hour taped interview, defendant consistently denied any involvement in the Jordan shooting.

Detective Gligorijevic interviewed defendant on the afternoon of December 23, 1998. The interview was tape-recorded. She took a non-confrontational approach, attempting to enable defendant to feel comfortable admitting he was in the van. She suggested possible mitigating factors and assured defendant that she would secure protection for his family should it become known that he had made a statement. Defendant denied being in the van but admitted that he put events into motion, although no one was supposed to be killed, and knew what had happened from others' accounts. The guns had been disposed of or destroyed.

Sergeant Aragon interviewed defendant again on December 23, 1998. During this taped interview, defendant admitted that he was in the front passenger seat of the van when the shooting occurred. He was armed with an AR-15 rifle. After the incident, Flaco burned the van. They melted the nine-millimeter handgun and sold the AR-15. Defendant fired no shots.[4]

Defense

According to Richard T. Mason, a clinical pathologist and expert in wound ballistics, Jordan's three gunshot wounds were inconsistent with those inflicted by an AR-15 rifle's .22 caliber bullets. They were consistent with those inflicted by either .45 caliber or 9-millimeter bullets.

McDonnell was hiding behind the ice-cream truck when he saw the rifle was pointed at him. McDonnell told Los Angeles Police Detective Francis Bishop that he believed Maclay Boys were responsible for the Jordan shooting.

Jose Barrera, Sr. told Los Angeles Police Detective Jose Martinez that he believed shots from the van were directed at a cousin of Wilson and Jordan. When Jordan ran up to the van, he grabbed the driver's shirt, after which the van backed into a chain-link fence. Another burst of four to six gunshots followed.

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[4] All three tape-recorded police interviews were played for the jury.

Pohl told Los Angeles Police Detective Rick Gonzalez that he and a few others, including Jordan, went to defendant's house looking for defendant's brother, Javier, but instead spoke to defendant's sister. They told the sister to let Javier know that they were looking for him.

DISCUSSION

Motion to Suppress Evidence

At the hearing on defendant's suppression motion, the trial court received the testimony of four witnesses: Sergeant Aragon; Detective Gligorijevic; Richard Leo, an expert on police interrogation techniques; and defendant. The court also listened to the three tape-recorded police interviews of defendant and reviewed the transcript of the polygraph examination. In reviewing the denial of a suppression motion, we view the record in the light most favorable to the trial court's ruling, deferring to the court's express or implied findings of fact if those findings are supported by substantial evidence. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) We then apply the relevant legal principles to the facts as found by the trial court to determine as a matter of law whether the seizure was reasonable. (*Ibid*.)

Fourth Amendment Claim

There was no relevant evidence seized after a search either of defendant's home or property or of his person. The only relevant "seizure" was of his person.

In the absence of exigent circumstances, a warrantless arrest in the home is per se unreasonable. (*People v. Marquez* (1992) 1 Cal.4th 553, 566; accord, *Payton v. New York* (1980) 445 U.S. 573, 583-590.) The same principle applies to an in-home investigative detention. (*People v. Williams* (1979) 93 Cal.App.3d 40, 57.)

Here, after receiving information that defendant was involved in the shooting of Jordan, Sergeant Aragon sought defendant at his parents' home. After receiving a contact number, Sergeant Aragon telephoned defendant. In an effort to secure his address and get him out of his residence, Sergeant Aragon told defendant, falsely, that the police were investigating a rock-throwing incident on the freeway and wanted to examine defendant's car. Defendant agreed to speak to Sergeant Aragon and gave him his address.

When the police arrived, defendant was outside of his apartment building, waiting for them. At some point, Sergeant Aragon informed defendant that he wanted to talk to him about Jordan's shooting. Defendant agreed to go voluntarily to the police station to talk about the shooting, after which he signed a consent form to that effect.

We need not decide whether use of a ruse to circumvent the warrant requirement by luring the suspect outside is improper. As long as the police have probable cause to arrest, an improper entry into a home to make a warrantless arrest does not invalidate the arrest or require the suppression of any information gathered other than that obtained solely from searching the home at the time of the arrest. (*People v. Marquez*, *supra*, 1 Cal.4th at pp. 568-569; *People v. Watkins* (1994) 26 Cal.App.4th 19, 29.) By the same token, employing a ruse to circumvent the warrant requirement would not invalidate the arrest or invalidate statements subsequently made at a police station—*if* the police have probable cause to arrest the suspect when they utilize the ruse. The analysis is the same.

As discussed in *Watkins*, "'The United States Supreme Court considered a similar situation in *New York v. Harris* (1990) 495 U.S. 14 . . . , where police, without a warrant but with probable cause, arrested Harris in his apartment. The court noted that the purpose of the warrant requirement for an arrest in the home is to protect the home. Thus anything incriminating that the police gathered from arresting Harris in his home, rather than elsewhere, must be suppressed. The court refused to require suppression of statements made at the police station, explaining: "Nothing in the reasoning of that case [*Payton v. New York*, *supra*, 445 U.S. 573] suggests that an arrest in a home without a

warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house. There could be no valid claim here that Harris was immune from prosecution because his person was the fruit of an illegal arrest. [Citation.] Nor is there any claim that the warrantless arrest required the police to release Harris or that Harris could not be immediately rearrested if momentarily released. Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given Miranda warnings and allowed to talk. For Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his door step, illegally entered his home to search for evidence, and later interrogated Harris at the station house. Similarly, if the police had made a warrantless entry into Harris' home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible." (Id at p. 18 . . . .)' ([*People v.*] *Marquez*, *supra*, 1 Cal.4th at pp. 568-569, brackets in *Marquez*.) The federal constitutional analysis of *Harris* also governs under the California Constitution. (*Marquez*, *supra*, 1 Cal.4th at p. 569.)" (*People v. Watkins*, *supra*, 26 Cal.App.4th at p. 30, fn. omitted.)[5]

It is of no significance that the People failed to advance this theory below or on appeal. "[A] theory which assumes illegal police conduct but nevertheless sustains the search or seizure, such as inevitable discovery, may be raised for the first time on appeal. [Citation.] *Harris* and *Marquez* stand for such a theory." (*People v. Watkins*, *supra*, 26

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[5] Defendant argues that the evidence flowing from the arrest should have been excluded and hence, the trial court erroneously denied the suppression motion. Defendant does not cite or discuss *Harris* and *Marquez*. Neither do the People. The issue of whether suppression was required if the manner of the arrest was unconstitutional nevertheless has been "proposed" and "briefed" by a party to the proceeding. This renders supplemental briefing unnecessary. (See Gov. Code, § 68081.)

Cal.App.4th at p. 31.) The People's default consequently "does not bar us from resting our opinion on *Harris* and *Marquez*." (*Ibid.*)

It is undisputed that the police had probable cause to arrest defendant when they lured him out of his apartment. Indeed, they had secured an arrest warrant months earlier. The statements defendant later made at the police station therefore do not require suppression as the fruit of an improper warrantless arrest. (*People v. Watkin*s, *supra*, 26 Cal.App.4th at p. 31.)

Fifth Amendment Claim

The following facts are undisputed: before Sergeant Aragon interviewed defendant at approximately midnight on December 21, or shortly thereafter on December 22, 1998, Sergeant Aragon advised defendant of his *Miranda*[6] rights. Defendant stated that he understood his rights and agreed to talk about the shooting. On December 23, defendant agreed to a polygraph examination. En route to Parker Center for administration of the polygraph examination, Detective Gligorijevic asked defendant whether he remembered Sergeant Aragon earlier advising him of his rights. Defendant said that he did.

At the conclusion of the polygraph examination at approximately 2:00 p.m., defendant asked to speak to Detective Gligorijevic. He asked her what she could offer him. He said he was willing to talk about the case because he was concerned for his safety and that of his family. At approximately 7:00 p.m. that evening, Sergeant Aragon advised defendant that he had presented defendant's case to the District Attorney, so defendant would be going to court in the morning. He told defendant he had one more opportunity to talk to Sergeant Aragon if he wished to do so. Sergeant Aragon soon interviewed defendant for a second time.

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

With respect to disputed facts, the court made the following express and implied findings:[7] defendant made a knowing and intelligent waiver of his constitutional rights. While defendant is relatively young and has little formal education, he revealed himself during the tape-recorded interviews and his testimony to be "an intelligent, street-savvy person. He knew exactly what was going on." Defendant never refused to speak to Detective Gligorijevic about the shooting.[8] After Sergeant Aragon offered defendant one last opportunity to talk on the evening of December 23, defendant stated that he did want to talk about the shooting. He wanted to make a deal. We are bound by these factual findings. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

Defendant argues that the second and third interviews could not be used against him inasmuch as the police failed to advise him again of his rights before conducting those interviews. As explained in *People v. Mickle* (1991) 54 Cal.3d 140, 170, "readvisement [of *Miranda* rights] is unnecessary where the subsequent interrogation is 'reasonably contemporaneous' with the prior knowing and intelligent waiver. [Citations.] The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights. [Citations.]"

The inquiry "'[w]hether one [*Miranda*] warning is sufficient to cover a subsequent interrogation is . . . factual . . . in each case.'" (*People v. Thompson* (1992) 7 Cal.App.4th

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[7] The court expressly declined to determine whether Detective Gligorijevic again advised defendant of his rights en route to the polygraph examination, believing it unnecessary to resolve this disputed fact.

[8] Defendant testified that he refused to speak to Detectives Gligorijevic and Gonzalez on the morning of December 22 and late in the afternoon on December 23. Detective Gligorijevic testified that defendant never stated he did not want to talk to her. The court made no express finding on this point.

1966, 1971.) We must accept the trial court's resolution of this issue if it is supported by substantial evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 128.)

Here, the second interview took place approximately 38 hours after defendant waived his rights and the third interview approximately 5 hours later. (See, e.g., *People v. Mickle*, *supra*, 54 Cal.3d at p. 171 [no readvisement necessary after 36 hours]; *Morton v. Wainwright* (11th Cir. 1985) 770 F.2d 918, 930-931 [no readvisement necessary one week later].) It was clear to defendant at all times that he was still in official custody and that all of his interrogators were police agents. (Compare *People v. Quirk* (1982) 129 Cal.App.3d 618, 630 [readvisement essential when it is not clear that interrogator is an agent of the police].) He received a reminder of the earlier advisement before he took the polygraph examination. Although fairly young and having little formal education, defendant is "intelligent and street-savvy," i.e., relatively sophisticated. He demonstrated a clear understanding that he might be able to help himself by stating his side of the story.

While the identity of the interrogator and the place of interrogation changed from the first to the second interview, defendant initiated these changes. At the conclusion of the polygraph examination, while still at Parker Center, defendant asked to speak to Detective Gligorijevic. He was eager to talk about the shooting. These circumstances amount to a renewed waiver of his rights. (*People v. Waidla* (2000) 22 Cal.4th 690, 726-727, 731.)

The third interview took place in the same place and with the same interrogator as the first interview. Once again, defendant initiated the interview and wanted to cooperate. This expressed desire to discuss the investigation also amounts to a renewed waiver of his rights. (*People v. Waidla*, *supra*, 22 Cal.4th at pp. 726-727, 731.)

In short, viewing the totality of the circumstances, the second and third police interviews were "'reasonably contemporaneous' with the prior knowing and intelligent waiver," thus rendering readvisement unnecessary. (*People v. Mickle*, *supra*, 54 Cal.3d at p. 170.) There consequently was no Fifth Amendment violation necessitating suppression of the statements he made during these interviews.

Sixth Amendment Claim

In the absence of a valid waiver, a defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charge attaches. (*United States v. Gouveia* (1984) 467 U.S. 180, 187.) The right does not attach, however, until initiation of adversary judicial criminal proceedings, such as by the filing of a felony complaint. (*Kirby v. Illinois* (1972) 406 U.S. 682, 688; *People v. Engert* (1987) 193 Cal.App.3d 1518, 1526.)

At approximately 2:00 p.m. on December 23, 1998, Sergeant Aragon presented defendant's case to the District Attorney. Late in the afternoon, near the end of the process, Detectives Gligorijevic and Gonzalez contacted him at the District Attorney's office. When Sergeant Aragon speaks of filing, he means the process of reviewing the paperwork the police present, then making a decision to file charges.

It is on this slender reed that defendant bases his claim that he was denied his right to counsel during the second and third interviews. The trial court found that the felony complaint was filed on the afternoon of December 23, 1998, before Sergeant Aragon's 7:00 p.m. interview of defendant. There is no evidence to support the finding, however. According to Sergeant Aragon, when Detectives Gligorijevic and Gonzalez contacted him at the District Attorney's office, "the document," i.e., the felony complaint, still was in the office. It had not been filed with the court clerk. As Sergeant Aragon had explained, when he spoke of filing, he meant presenting *his paperwork* to the District Attorney, not the preparation and filing of the felony complaint. There is no evidence in the record before us that the complaint was completed and actually filed on that date, but there is evidence suggesting that it was very late in the day, with little time remaining in which to file it. Inasmuch as the court's finding is not supported by substantial evidence, we cannot defer to it. (*People v. Glaser*, *supra*, 11 Cal.4th at p. 362.)

In his reply brief, defendant argues for the first time, either below or on appeal, that his arraignment was unnecessarily delayed in order to allow Sergeant Aragon to interview him again before the felony complaint was filed. Because the argument was

not raised below, the People presented no evidence to refute it. Under these circumstances, it is appropriate for us to reject the argument as improperly raised. (*In re M.S.* (1995) 10 Cal.4th 698, 727; compare *People v. Carr* (1974) 43 Cal.App.3d 441, 444.)

In summary, there is no evidence that the felony complaint against defendant had been filed before Detective Aragon conducted his last interview. There accordingly is no evidence that defendant was denied his right to have counsel present during that interview.

Fourteenth Amendment Claim

Defendant argues that his statements were involuntary, in that the interviews were so psychologically coercive that they overwhelmed his will. (*People v. Cahill* (1993) 5 Cal.4th 478, 485.) Dr. Leo expressed his expert opinion that this in fact was the case. The trial court expressly rejected Dr. Leo's opinion, however, noting his decided bias on the issue and the absence of any hint of coercion or undue pressure on the tapes of the interviews.

The court specifically rejected the opinion that by expressing empathy with defendant and suggesting in the first interview that most people would have reacted to the situation as he did, Sergeant Aragon offered an improper inducement. The court was correct. Informing someone that his conduct is understandable suggests, at most, that he may be able to convince the District Attorney or the court that his conduct was justifiable. It promises nothing. It therefore is not an implied promise of leniency. More importantly, it had no effect on defendant. He continued to deny any involvement in the shooting of Jordan.

Advice or exhortation to tell the truth does not render a statement involuntary (*People v. Howard* (1988) 44 Cal.3d 375, 398), nor does a detective's offer to intercede with the district attorney when the officers do not then know the full extent of what the defendant has done (*People v. Jones* (1998) 17 Cal.4th 279, 298). Similarly, a statement

will be voluntary if the police merely present a description of the "real situation" the suspect is in. (*People v. Maestas* (1987) 194 Cal.App.3d 1499, 1506.) As noted in *Jones*, "[t]he business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. '[A]lthough adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never been the norm that dictates the rules of investigation and the gathering of proof.' [Citation.] 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' [Citation.]" (*Jones*, *supra*, at pp. 297-298.)

The detectives did nothing more than describe the "real situation" in which defendant found himself, and then urge defendant to tell the truth, stating that if he did so, they would inform the District Attorney that he had done so and was willing to cooperate. They made clear to him that they could promise nothing. The District Attorney would decide the consequences of his cooperation and would decide whether his version of events amounted to self-defense. That is, they promised him nothing—expressly or impliedly—other than those benefits naturally flowing from telling the truth.

Defendant relentlessly sought a deal. As the trial court expressly found, neither Detective Gligorijevic nor Sergeant Aragon promised him one or promised that he would receive lenient treatment if he confessed. The record supports that conclusion. Detective Gligorijevic explicitly stated that she could not say he would not go to prison because she did not know what he had done. That was appropriate. (*People v. Jones*, *supra*, 17 Cal.4th at p. 298.)

Defendant willingly submitted to the polygraph examination. As a consequence, neither the fact of the examination nor the examiner's statement that defendant was not truthful in all respects demonstrates coercion. (*People v. Brown* (1981) 119 Cal.App.3d 116, 127.) Moreover, it is clear from defendant's interview with Detective Gligorijevic that it was not the manner in which the examination was conducted that induced him to

make a more incriminating statement. He did so, rather, because the results of the examination were not what he had hoped they would be.

Finally, that defendant made increasingly incriminating statements to the police is not necessarily suggestive of coercion. The court "listened carefully to the inflections of the defendant when he was making his various statements. They did not appear to be under any pressure, that he was feeling compelled to say something, or that he was scared. . . . [I]t seemed to me, based upon everything I listened to in these tapes, he knew exactly what he was doing and that he had made a decision that he was going to tell what had happened about others' involvement. He was still claiming he hadn't been involved, other than sitting in the passenger seat, and that he was concerned about his safety on a going-forward basis, particularly concerned about when Mr. Rangel's lawyer would find out that he had made this statement.

"These are not the mental processes and statements of someone who is being coerced into giving a statement. He was thinking clearly and intelligently proceeding about doing what he thought was in his best interest." In other words, in this case, defendant's increasingly incriminating statements appear to follow naturally from his canny, street-wise intelligence rather than from psychological coercion.

In summary, the People met their burden of demonstrating that defendant made his statements voluntarily. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) His statements therefore were admissible.

Sufficiency of the Evidence

According to defendant, as related in the statements he gave police, when he returned home on August 31, 1998, his brothers informed him that Nurmi Street gang members, including Jordan, had come to the house and shown disrespect for his sister, threatening her with a gun. Defendant orchestrated a confrontation with Jordan. Defendant did not intend to have Jordan killed, however. At most, his friends were to

beat up Jordan. Defendant, Flaco and Pekas got into a van. Defendant was sitting in the passenger's seat, armed with an AR-15 rifle. Pekas had a 9-millimeter handgun. A backup vehicle containing two other members of his Maclay Boys gang, one of whom (Javi) was armed with a .45 caliber handgun, followed them. Their purpose was to talk to Jordan or to beat him up, if necessary. When they drove up to the driveway, they decided to back off, given the presence of several children. When defendant saw the children, he put down the rifle. Defendant asked for Jordan. Some individuals began rushing the van. As the van backed up, Pekas shot his 9-millimeter weapon from the van and Javi, who had gotten out of the backup vehicle, fired the .45 caliber handgun.

Relying on *People v. Bloyd* (1987) 43 Cal.3d 333, at page 349, and *People v. Collins* (1961) 189 Cal.App.2d 575, at page 591, defendant argues that the prosecution is bound by this version of events, which does not support first degree murder or special circumstance murder. That would be true if there were no evidence to the contrary (*Bloyd*, *supra*, at p. 349; *Collins*, *supra*, at p. 591)—but there is.

First degree murder is the unlawful killing of a human being, committed with malice aforethought and in a willful, deliberate and premeditated manner. (Pen. Code, §§ 187, subd. (a), 189.) Substantial evidence of planning, motive and intent to kill is more than adequate to establish that a murder is willful, deliberate and premeditated. (Cf. *People v. Proctor* (1992) 4 Cal.4th 499, 529; *People v. Hernandez* (1988) 47 Cal.3d 315, 349-350.) That "[t]he murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death," is a special circumstance punishable by death or life imprisonment without the possibility of parole. (Pen. Code, § 190.2, subd. (a)(21).)

One may aid and abet first degree murder as long as one intends to facilitate or encourage the actor, knowing the actor's criminal intent. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561; *People v. Hickles* (1997) 56 Cal.App.4th 1183, 1193.) The special circumstance delineated above may apply to one who is not the actual killer, as long as that person, "with the intent to kill, aids, abets, counsels, commands, induces, solicits,

requests, or assists any actor in the commission of murder in the first degree . . . ." (Pen. Code, § 190.2, subd. (c).)

The gunshot wound to Jordan's abdomen was fatal, while a second of three wounds, to the shoulder, was potentially fatal, although Jordan would have survived it with prompt medical treatment. The medical examiner recovered a .45 caliber bullet from Jordan's body. All three wounds could have been caused either by .45 caliber bullets or by 9-millimeter bullets, but could not have been caused by the .22 caliber bullets fired by an AR-15 rifle. Inasmuch as Javi had the sole .45 caliber weapon and, according to defendant's statement, had gotten out of the backup vehicle before shots were fired, this evidence would suggest that the fatal shot was not necessarily fired from a vehicle. There is other evidence, however.

When the van pulled into the driveway of the Pohl residence, McDonnell walked up to it to see who was in it. Shortly thereafter, the passenger pulled out a rifle. When McDonnell saw the rifle, he turned and ran for cover. Seconds later, he heard shots coming from the van. He saw Jordan approach the driver's side of the van. Jordan grabbed the driver by the shirt, and then grabbed the steering wheel as the van was backing out of the driveway. The van's occupants fired another round of approximately 9 to 10 gunshots. These shots sounded like they came from both a handgun and a rifle. No witness mentioned seeing another vehicle arrive in company with the van or seeing shots fired from anywhere other than the van. This is solid circumstantial evidence that the fatal shot, whether fired from a .45 caliber or a 9-millimeter weapon, came from inside the van.

There is substantial circumstantial evidence that the killing was intentional and premeditated and that defendant personally harbored intent to kill. According to Lara, defendant's sister, a group of people came to her home on August 31, 1998, looking for Javier Escobedo, one of her brothers. One of the men said he was "Nurmi from Nurmi Street." They were going to kill Javier. One of the men had a gun, while others were carrying tools. Lara later related these events to her brothers, defendant and Javier. According to Detective Gligorijevic, the actions of Jordan and his friends were a sign of

challenge and disrespect to the Maclay Boys gang. This provided defendant and his friends with motive to kill.

There clearly was planning. As defendant admitted, he and his friends acquired the van and armed its occupants before going in search of Jordan. Other evidence supports the inference that they planned to kill from the outset.

Avila, who is Javier Escobedo's girlfriend, telephoned Moro approximately one hour before the van approached the driveway. She warned Moro to "get [her] daughter out of there quick" because Maclay Boys gang members were "upset and . . . out there to kill and they don't play around." According to Avila, she meant the Nurmi Street gang members who would be gathering at Pohl's residence, rather than defendant and his cohorts. Given Avila's connection to the Escobedos, however, Moro understood Avila to mean Maclay Boys. This, in itself, constitutes evidence that the killing was intentional, deliberate and premeditated. There is also evidence of defendant's intent to kill in his raising the rifle to point it at McDonnell, leading the driver to protest, "No, there's too many kids." (*People v. Wynn* (1968) 257 Cal.App.2d 664, 672; see also *People v. Dick* (1968) 260 Cal.App.2d 369.)

In summary, there is substantial evidence of motive and opportunity to kill, as well as intent to kill, both as a group and as individuals. Coupled with substantial evidence that the fatal shot necessarily came from inside the van, this evidence supports both the finding that the killing was first degree murder and that defendant is personally liable for the intentional-shooting-from-motor-vehicle-with-intent-to-kill special circumstance.

Instructional Error

In assessing claimed instructional error, we examine not only the challenged instruction itself, but also the entire charge to the jury. (*People v. Garrison* (1989) 47 Cal.3d 746, 780; *People v. Burgener* (1986) 41 Cal.3d 505, 538.) On appeal, we must assume the jurors are intelligent and capable of correlating all instructions given them,

and that they have interpreted the instructions correctly as a whole. (*People v. Lonergan* (1990) 219 Cal.App.3d 82, 91-92.)

Special Instruction on Mistake of Law

Defendant requested a special instruction on mistake of law, which the trial court properly refused. A mistake of law instruction is warranted only where the evidence supports a reasonable inference that the defendant made the mistake in good faith. (*People v. Flora* (1991) 228 Cal.App.3d 662, 669.) There is not a scintilla of evidence that defendant was operating under a mistake of law, genuinely entertained in good faith. To the contrary, his shifting statements to the police demonstrate his consciousness of his legal culpability, as does his destruction of evidence following the shooting. The trial court did not err in refusing the proffered instruction.

Amplification to CALJIC No. 8.73

As given, CALJIC No. 8.73 provides that "[i]f the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation." Defendant requested addition to the instruction of the following language: "If you have a reasonable doubt that the killing was first degree murder, you must give the defendant the benefit of that doubt and find him not guilty of first degree murder. Evidence of provocation may, by itself, raise a reasonable doubt in your mind that the killing was first degree murder."

The trial court properly refused this amplification as redundant and, thus, unnecessary. CALJIC No. 8.71 instructed the jury that if it had a reasonable doubt as to whether the murder was first or second degree, it must give the defendant the benefit of the doubt. As written, CALJIC No. 8.73 instructed the jury that evidence of provocation should be considered in deciding the degree of murder. Considered together (*People v.*

Garrison, *supra*, 47 Cal.3d at p. 780; *People v. Burgener*, *supra*, 41 Cal.3d at p. 538), these instructions adequately fulfill the purpose of the requested amplification.

Amplification to CALJIC No. 8.42

As pertinent, CALJIC No. 8.42 provided that "[t]o reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

"The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] own standard of conduct and to justify or excuse [himself] because [his] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable, period of time. . . ."

Defendant requested the following additional language: "A defendant or his companions may act in the heat of passion at the time of killing as a result of a series of events which occur over a considerable period of time. [¶] Where the provocation extends for a long period of time, you may take such period of time into account in determining whether there was a sufficient cooling period for the passion to subside. The burden is on the prosecution to establish beyond a reasonable doubt that the defendant did not act in the heat of passion."

Once again, the trial court properly refused this instruction as redundant and, thus, unnecessary. The essential point of the amplification—that adequate provocation may occur over a considerable period of time—appears in the standard form of CALJIC No. 8.42. Its companion instruction, CALJIC No. 8.43, instructed the jury with respect to

a cooling off period. Moreover, the jury had been instructed on the prosecution's burden of proof. (CALJIC Nos. 8.10, 8.20, 8.71.) No further instruction was necessary. (*People v. Wright* (1988) 45 Cal.3d 1126, 1134.)

Propriety of CALJIC No. 2.90

Both the California and the United States Supreme Courts have accepted as constitutional the language used in the current version of CALJIC No. 2.90, given by the trial court in the instant case, which requires only an "abiding conviction of the truth of the charge." (*Victor v. Nebraska* (1994) 511 U.S. 1, 14-15; *People v. Freeman* (1994) 8 Cal.4th 450, 505, cert. den. (1995) 515 U.S. 1149.) The courts of appeal consistently have rejected challenges to this language. (*People v. Miller* (1999) 69 Cal.App.4th 190, 213-214, review den. Apr. 14, 1999; *People v. Gonzalez* (1998) 64 Cal.App.4th 432, 451, review den. Sep. 23, 1998; *People v. Aguilar* (1997) 58 Cal.App.4th 1196, 1207-1209, review den. Feb. 18, 1998; *People v. Godwin* (1996) 50 Cal.App.4th 1562, 1571-1572, review den. Feb. 26, 1997; *People v. Barillas* (1996) 49 Cal.App.4th 1012, 1022, review den. Jan. 15, 1997; *People v. Carroll* (1996) 47 Cal.App.4th 892, 895-896; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 815-816; *People v. Tran* (1996) 47 Cal.App.4th 253, 262-263, review den. Oct. 16, 1996; *People v. Light* (1996) 44 Cal.App.4th 879, 884-889, review den. Aug. 14, 1996; *People v. Torres* (1996) 43 Cal.App.4th 1073, 1078, review den. May 22, 1996.) As stated in *People v. Hearon* (1999) 72 Cal.App.4th 1285, "[t]he time has come for appellate attorneys to take this frivolous contention off their menus." (At p. 1287.)

Propriety of CALJIC No. 17.41.1

Defendant argues that instructing the jurors with CALJIC No. 17.41.1, popularly described as the anti-nullification instruction,[9] violated his state and federal constitutional

[9] "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that

rights to a jury trial, jury unanimity and due process of law. Defendant failed to object to this instruction. He consequently has waived his challenge to CALJIC No. 17.41.1 unless the instruction affects any of his substantial rights. (*People v. Elam* (2001) 91 Cal.App.4th 298, 310-313; see also *People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

The California Supreme Court recently considered the propriety of CALJIC No. 17.41.1. In *People v. Engelman* (2002) 28 Cal.4th 436, 439-440, 449, the court holds that CALJIC No. 17.41.1 does not affect any fundamental constitutional rights, although the court deems it prudent that the instruction not be given in trials conducted in the future. Defendant accordingly has waived any claim of error on appeal.

CONCLUSION

The police did not violate any constitutional rights in securing defendant's extrajudicial statements. Substantial evidence supports his first degree murder conviction and the special circumstance finding. The trial court did not err in refusing defendant's special instruction on mistake of law and his proposed amplifications to CALJIC Nos. 8.73 and 8.42. It also did not err in instructing the jury with CALJIC Nos. 2.90 and 17.41.1.

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any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of that situation."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

ORTEGA, J.

MALLANO, J.